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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 RHONDA T.,

9 Plaintiff,

Case No. C18-5867 JCC

10 v.

ORDER REVERSING AND  
REMANDING FOR FURTHER  
ADMINISTRATIVE PROCEEDINGS

11 COMMISSIONER OF SOCIAL SECURITY,

12 Defendant.

13 Plaintiff seeks review of the denial of her application for Disability Insurance Benefits.  
14 Plaintiff contends the ALJ erred by rejecting her testimony and finding her impairments did not  
15 medically equal a listed impairment. Dkt. 9. As discussed below, the Court REVERSES the  
16 Commissioner's final decision and REMANDS the matter for further administrative proceedings  
17 under sentence four of 42 U.S.C. § 405(g).

18 I. BACKGROUND

19 Plaintiff is currently 43 years old, has a high school education, and has worked as a  
20 receptionist. Administrative Record (AR) 35, 23. Plaintiff applied for benefits in May 2015,  
21 alleging disability as of June 1, 2014. AR 81. Plaintiff's application was denied initially and on  
22 reconsideration. AR 80, 88. After the ALJ conducted a hearing on June 8, 2017, the ALJ issued  
23 a decision finding Plaintiff not disabled. AR 29, 15-23.

ORDER REVERSING AND REMANDING  
FOR FURTHER ADMINISTRATIVE  
PROCEEDINGS - 1

1 II. THE ALJ'S DECISION

2 Utilizing the five-step disability evaluation process,<sup>1</sup> the ALJ found that, from the alleged  
3 onset date of June 1, 2014, to the September 30, 2017, date last insured:

4 Step one: Plaintiff did not engage in substantial gainful activity.

5 Step two: Plaintiff had the following severe impairment: migraines.

6 Step three: Her impairment did not meet or equal the requirements of a listed  
7 impairment.<sup>2</sup>

8 Residual Functional Capacity: Plaintiff could perform work at all exertional levels. She  
9 could occasionally climb ladders, ropes, or scaffolds. She could tolerate occasional  
exposure to hazards, bright lights, loud noise, vibration, temperature or humidity  
extremes, and concentrated levels of pulmonary irritants.

10 Step four: Plaintiff could perform past relevant work as a receptionist and thus was not  
11 disabled.

12 Step five: The ALJ did not reach step five.

13 AR 17-23. The Appeals Council denied Plaintiff's request for review, making the ALJ's  
14 decision the Commissioner's final decision. AR 1.

15 III. DISCUSSION

16 This Court may set aside the Commissioner's denial of Social Security benefits only if  
17 the ALJ's decision is based on legal error or not supported by substantial evidence in the record  
18 as a whole. *Trevizo v. Berryhill*, 871 F.3d 664, 674 (9th Cir. 2017). Each of an ALJ's findings  
19 must be supported by substantial evidence. *Reddick v. Chater*, 157 F.3d 715, 721 (9th Cir.  
20 1998). "Substantial evidence" is more than a scintilla, less than a preponderance, and is such  
21 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.  
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23 <sup>1</sup> 20 C.F.R. § 404.1520.

<sup>2</sup> 20 C.F.R. Part 404, Subpart P, Appendix 1.

1 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th  
2 Cir. 1989). The ALJ is responsible for evaluating evidence, resolving conflicts in medical  
3 testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d  
4 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may  
5 neither reweigh the evidence nor substitute its judgment for that of the ALJ. *Thomas v.*  
6 *Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one  
7 interpretation, the ALJ’s interpretation must be upheld if rational. *Burch v. Barnhart*, 400 F.3d  
8 676, 680-81 (9th Cir. 2005). This Court “may not reverse an ALJ’s decision on account of an  
9 error that is harmless.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

10 **A. Plaintiff’s Testimony**

11 At the 2017 hearing, Plaintiff testified she had migraines almost once a week. AR 46, 48.  
12 Her migraines cause nausea and vomiting. AR 61-63. She cannot do anything during a  
13 migraine. AR 64. Plaintiff kept a journal documenting her migraines from June 2015 to April  
14 2016, which showed one to four migraines each month. AR 236-46.

15 Where, as here, an ALJ determines a claimant has presented objective medical evidence  
16 establishing underlying impairments that could cause the symptoms alleged, and there is no  
17 affirmative evidence of malingering, the ALJ can only discount the claimant’s testimony as to  
18 symptom severity by providing “specific, clear, and convincing” reasons that are supported by  
19 substantial evidence. *Trevizo*, 871 F.3d at 678. The ALJ discounted Plaintiff’s testimony based  
20 on a lack of supporting medical evidence, minimal treatment, and inconsistency with her daily  
21 activities. AR 21.

22 1. Overall Medical Record

23 An ALJ cannot reject a claimant’s symptom testimony “solely because the available

1 objective medical evidence does not substantiate [the claimant's] statements." 20 C.F.R.  
2 § 404.1529(c)(2). An ALJ may, however, reject the claimant's subjective symptom testimony  
3 when it is affirmatively contradicted by the medical evidence. *See Carmickle v. Comm'r, Soc.*  
4 *Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008); *Morgan v. Comm'r of Soc. Sec. Admin.*, 169  
5 F.3d 595, 599-600 (9th Cir. 1999). Here, the ALJ found that the overall medical evidence did  
6 not support Plaintiff's testimony. AR 21. The Commissioner goes farther and argues that  
7 Plaintiff's testimony is "contradicted by the objective medical record." Dkt. 10 at 8. The  
8 Commissioner does not, however, identify any objective medical evidence that affirmatively  
9 contradicts Plaintiff's testimony.

10 None of the evidence the ALJ relied on undermines Plaintiff's testimony. The ALJ noted  
11 that neurological findings were normal, but did not explain what abnormal findings would be  
12 expected with migraines or how normal neurological findings contradict Plaintiff's symptom  
13 testimony. AR 21. The record indicates that a "head CT" was ordered because of "red flags"  
14 including Plaintiff's "family history of aneurysms." AR 285. Even after the "CT of the head  
15 was normal" Plaintiff's providers continued to diagnose and treat migraines. AR 281. Plaintiff's  
16 cranial nerves, sensation, reflexes, gait and coordination were intact, but no doctor suggested this  
17 was inconsistent with her diagnosis of migraines or her reported symptoms. *See* AR 292-93,  
18 298, 304, 448.

19 The ALJ also pointed out that Plaintiff "consistently appeared healthy and not in acute  
20 distress during treatment visits." AR 21. But migraines are a periodic, not constant, impairment  
21 and Plaintiff's appearance when not suffering from a migraine reveals nothing about how  
22 migraines affect her.

23 The Court concludes the ALJ erred by rejecting Plaintiff's testimony based on lack of

1 support in the medical record.

2 2. Minimal Treatment

3 An “unexplained or inadequately explained failure” to seek treatment or follow  
4 prescribed treatment can be a valid reason to discount a claimant’s testimony, but an ALJ must  
5 consider a claimant’s proffered reasons. *Trevizo*, 871 F.3d at 679-80. The ALJ discounted  
6 Plaintiff’s testimony because in February 2015 she declined to try another prophylactic  
7 medication at that time, and because she went “for long periods without taking any medication to  
8 address her condition.” AR 21 (citing AR 278-85, 297, 303-04, 313). However, the ALJ failed  
9 to address the Plaintiff’s reasons, including the effects of pregnancy and breastfeeding, and side  
10 effects of the medications.

11 During the relevant period from June 2014 to September 2017, Plaintiff was pregnant and  
12 then breastfeeding from roughly March 2015 to March 2017. AR 290, 298. She testified that  
13 she did not have migraines for the first six months of her pregnancy. AR 51. Plaintiff testified  
14 that when the migraines started again, her obstetrician prescribed Fioricet, which the ALJ  
15 described as a “low-level” pain medication, to help when she got a migraine because it “wouldn’t  
16 hurt the baby.” AR 53. Plaintiff’s neurologist recommended avoiding prophylactic medication  
17 while she was breastfeeding. AR 449.

18 In February 2015, Plaintiff stopped a prophylactic medication, Topamax, because it  
19 caused tingling and numbness in her hands and feet. AR 278. At that time, she declined to try  
20 another prophylactic medication. AR 279. In a March 2017 treatment note, Plaintiff’s provider  
21 noted that she had tried “multiple therapies” including Topamax, which she “did not tolerate”  
22 and resulted in “no improvement in” symptoms; Relpax, which “was successful initially then  
23 w[a]ned in effectiveness”; and sumatriptan, which Plaintiff “does not tolerate orally.” AR 298.

1 The provider discussed trying propranolol, or sumatriptan by another delivery method, and  
2 Plaintiff agreed to start medication when she finished breastfeeding. AR 298-99. The record  
3 contains no treatment notes from after March 2017. *See* Dkt. 6 at 4, Court Transcript Index.

4 The ALJ also noted that Plaintiff testified to adverse side effects but found this testimony  
5 was “not supported fully by the record and [did] not account for her failure to exhaust potential  
6 treatment options for her condition.” AR 21 (citing AR 278, 293). In support, the ALJ cited to a  
7 treatment note documenting side effects, and a December 2015 consultative report stating that  
8 Plaintiff “has not been evaluated by a neurologist as far as I can tell, nor has she exhausted the  
9 potential interventions as far as migraine management.” AR 293. Nothing in the record  
10 undermines Plaintiff’s testimony regarding side effects. *See* AR 278 (Topamax caused tingling  
11 and numbness), 298 (Plaintiff “did not tolerate” Topamax or sumatriptan orally). Plaintiff did  
12 see a neurologist in September 2016. AR 447-50. And the ALJ has not identified any treatment  
13 recommendations that Plaintiff did not follow. Substantial evidence does not support the ALJ’s  
14 findings.

15 Under the circumstances, Plaintiff declining to try a new medication on one occasion in  
16 February 2015, when the record shows she had tried several medications by March 2017, is not  
17 the type of clear and convincing reason that is needed to discount a claimant’s testimony. The  
18 ALJ also erred by failing to address Plaintiff’s reasons for not using medication at times, which  
19 included a lack of migraines in early pregnancy, avoiding medication while pregnant and  
20 breastfeeding, and side effects. *See Trevizo*, 871 F.3d at 679-80.

21 The Court concludes the ALJ erred by discounting Plaintiff’s testimony based on lack of  
22 treatment.

1                   3.       Activities of Daily Living

2           An ALJ may discount a claimant’s testimony based on daily activities that either  
3 contradict her testimony or that meet the threshold for transferable work skills. *Orn v. Astrue*,  
4 495 F.3d 625, 639 (9th Cir. 2007). The ALJ found that Plaintiff “was able to perform all  
5 activities of daily living independently,” including child care, household chores, errands, driving,  
6 and socializing. AR 21 (citing AR 291, 200-03). The evidence the ALJ cited reflects Plaintiff’s  
7 self-reports that she is able to maintain daily living activities *unless* she has a migraine. *See* AR  
8 200 (“can’t go outside or drive with a migraine”), 201 (husband does house and yard work when  
9 Plaintiff has migraine), 291 (able to do self-care and house and yard work “when she is not  
10 suffering from a migraine”). This does not contradict Plaintiff’s testimony or show that she is  
11 able to maintain employment.

12           Plaintiff reported that when she had a migraine her husband often had to miss work to  
13 help her with their young children. AR 53-57. The ALJ found that Plaintiff “failed to mention  
14 this level of debilitation during her treatment visits and consultative medical examination.” AR  
15 21-22. The record shows that Plaintiff consistently reported a high level of debilitation. A June  
16 2014 treatment note shows that Plaintiff reported that her migraines cause “nausea and vomiting.  
17 Lights and sounds make it worse. [The migraines] usually come about every week and last for  
18 three days. She had one recently that lasted seven days.” AR 284. In June 2016 Plaintiff  
19 reported having migraines “approximately one per week. They can last about three days. Pain  
20 gets up to 8/10 in intensity. For the first day she just vomits. Located on the left side of her head  
21 and is a stabbing pain.” AR 438. At her December 2015 consultative examination Plaintiff  
22 reported that she has migraines “about once a week, and they last for several days. She has  
23 nausea and vomiting and photophobia. She finds the headaches to be debilitating.” AR 290.

1 Because doctors' visits are focused on diagnosis and treatment, not on evaluating functional  
2 limitations, there is no reason for doctors' notes to mention that Plaintiff's husband must miss  
3 work to help Plaintiff when she has a migraine. The ALJ's inference, that the failure of  
4 treatment notes to report on Plaintiff's husband's activities casts doubt on Plaintiff's testimony,  
5 is not a reasonable one. *See Batson v. Comm'r, Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir.  
6 2004) ("[T]he Commissioner's findings are upheld if supported by inferences reasonably drawn  
7 from the record.").

8 The record consistently shows that Plaintiff is able to maintain normal activity only when  
9 not suffering from a migraine. The ALJ's finding that her activities contradict her testimony is  
10 unsupported by substantial evidence. The Court concludes the ALJ erred by discounting  
11 Plaintiff's testimony based on her daily activities.

12 4. Harmful Error

13 The ALJ erred by discounting Plaintiff's testimony without a clear and convincing  
14 reason. The error was harmful because the RFC did not include all limitations to which Plaintiff  
15 testified, and thus the ALJ may have relied at step four on a job that Plaintiff can no longer  
16 perform. *See Hill v. Astrue*, 698 F.3d 1153, 1162 (9th Cir. 2012). On remand, the ALJ must  
17 reevaluate Plaintiff's testimony.

18 **B. Listing 11.02**

19 Relying entirely on her own testimony, Plaintiff argues that her impairment medically  
20 equals Listing 11.02, epilepsy. Dkt. 9 at 4-6. Specifically, Plaintiff contends she meets 11.02D  
21 because she has the equivalent of dyscognitive seizures at least once every two weeks for three  
22 consecutive months and "marked limitation" in physical functioning. *Id.*; 20 C.F.R. Part 404,  
23 Subpart P, App. 1 at 11.02D. "Dyscognitive seizures are characterized by alteration of



consciousness.... During the seizure, blank staring, change of facial expression, and automatisms (such as lip smacking, chewing or swallowing, or repetitive simple actions, such as gestures or verbal utterances) may occur.” 20 C.F.R. Part 404, Subpart P, App. 1 at 11.00H1b. Examples of physical functioning include “[s]tanding up from a seated position, balancing while standing or walking, or using both your upper extremities for fine and gross movements....” *Id.* at 11.00G3a. There is no evidence in the record showing Plaintiff’s migraines cause alteration of consciousness or impair her abilities to stand, walk, or use her arms. A claimant bears the burden to provide proof that she is disabled. 20 C.F.R. § 404.1512(a). The Court concludes the ALJ did not harmfully err by failing to find Plaintiff’s impairments medically equaled the listed impairment of epilepsy.

### **C. Scope of Remand**

Plaintiff requests the Court remand for an award of benefits. Dkt. 9 at 12. In general, the Court has “discretion to remand for further proceedings or to award benefits.” *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may remand for further proceedings if enhancement of the record would be useful. *See Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000). The Court may remand for benefits where (1) the record is fully developed and further administrative proceedings would serve no useful purpose; (2) the ALJ fails to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on remand. *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). The Court has flexibility, however, “when the record as a whole creates serious doubt as to whether the claimant is, in fact, disabled within the meaning of the Social Security Act.” *Id.* at 1021.

1 Here, enhancement of the record would be useful. For a substantial portion of the  
2 relevant period, Plaintiff was pregnant or breastfeeding, which affected her medical condition as  
3 well as the available treatment. The medical record ends in March 2017 with Plaintiff's intent to  
4 begin medication as soon as she stopped breastfeeding. AR 298-99. The record contains no  
5 evidence as to how successful the new treatment regime was. Accordingly, the Court remands  
6 the case for further administrative proceedings.

7 IV. CONCLUSION

8 For the foregoing reasons, the Commissioner's final decision is REVERSED and this  
9 case is REMANDED for further administrative proceedings under sentence four of 42 U.S.C. §  
10 405(g).

11 On remand, the ALJ should reconsider Plaintiff's testimony, reevaluate the RFC if  
12 necessary, and proceed to steps four and five as needed.

13 DATED this 20th day of May, 2019.

14  
15   
16 John C. Coughenour  
UNITED STATES DISTRICT JUDGE